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IN THE

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OCTOBER TERM, 1980

ORIGINAL COPY

NO 79-6514

SAWYER LEWIS,
Petitioner

Vs.

THE LOUISIANA STATE PENITENTIARY,
Respondent

Response In Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit.

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QUESTION PRESENTED

WHETHER THE UNITED STATES DISTRICT COURT ERRED IN DENYING APPELLANT HABEAS CORPUS RELIEF, FINDING THAT APPELLANT HAD RECEIVED EFFECTIVE ASSISTANCE OF RETAINED COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE

Sawyer Lewis is a State prisoner presently serving a life sentence, without benefit of parole, after having been convicted by a jury on February 28, 1977, of possession of heroin with the intent to distribute, in violation of La.R.S. 40:966. At trial of this matter, appellant was represented by retained counsel, George Mouledoux, who had been a practicing member of the Louisiana State Bar for approximately fourteen years at the time of trial.

Petitioner chose not to appeal his conviction and sentence to the Supreme Court of Louisiana. Rather, he filed a petition for a Writ of Habeas Corpus in the State trial court alleging ineffective assistance of counsel. After conducting an evidentiary hearing, the State trial judge, the Honorable Charles R. Ward, denied petitioner relief. The Louisiana Supreme Court denied Lewis's application for Writs of Certiorari, Mandamus and Prohibition. State of Louisiana v. Sawyer Lewis, 352 So.2d 236 (La.1977).

On December 1, 1977, appellant filed a petition for Writ of Habeas Corpus with the United States District Court for the Eastern District of Louisiana numbered 77-3477, Section E. United States Magistrate Wicker, on November 30, 1978, recommended that the petition of Sawyer Lewis for a Writ of Habeas Corpus be dismissed. United States District Court Judge Fred J. Cassibry after carefully considering the petition, the record, including the State Court record, the law applicable to this case, and the Magistrate's Report and Recommendation, dismissed appellant's petition on December 22, 1978. Judgment was accordingly entered on December 26, 1978.

In an unpublished opinion dated February 4, 1980, the United States Court of Appeals for the Fifth Circuit affirmed the District Court decision denying the writ. Petitioner now comes before this Honorable Court seeking issuance of a Writ of Certiorari to review the Fifth Circuit decision.

STATEMENT OF THE FACTS

The record reflects that shortly after petitioner was arrested a preliminary hearing was conducted. The testimony adduced at that hearing showed that on December 29, 1976, at approximately 6:30 p.m., Officers Warren Keller and John Marie, Jr., of the New Orleans Felony Action Squad, who were making a routine wanted check for a suspected armed robber by the name of Lincoln Lewis (no relation) approached the Streamline Tavern in the 3200 block of Fern Street, New Orleans, Louisiana. As they alighted from their unmarked car, they saw petitioner enter the tavern in a "hurried" manner. Officer Marie followed Lewis into the bar, observed him run to the right side of the room, reach into a booth, grab a jacket, place something inside the "left" front pocket, "discard" and abandon the jacket into the booth, and walk away. Officer Marie then walked over to the jacket and looked into the "right" front pocket "figuring defendant might have threw (sic) a gun in there. It's a heavily narcotics traffic bar, many gun arrests have been made there." Although no gun was found, Marie testified that he found two balloons: one tied in a knot and one ripped open on the side. Further search of the jacket revealed loose tin foil packets along with a Public Service bill, loose keys and some change. (Transcript, Preliminary Hearing, pp. 2-17).

After Officer Marie retrieved the jacket and informed his partner of its contents, petitioner, who was now standing next to the jukebox several feet away, was instructed to walk outside. Once outside, Lewis was frisked for weapons. Officer Marie, after examining the remaining jacket pockets and the contents of the tin foil packets containing a brown powder which

he believed to be heroin, placed petitioner under arrest. (Tran. Preliminary Hearing, pp. 2-18).

The record reflects that although counsel did not file a motion to suppress this evidence, he did object to its introduction during the course of the trial. Tr. 46-49.

ARGUMENT

Both the United States District Court and the Court of Appeals for the Fifth Circuit properly found that federal habeas corpus relief is not available to the appellant since he received effective assistance of retained counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. The instant record reflects that:

1) Trial counsel for appellant, Mr. Mouledoux, is a member of the Bar of the State of Louisiana and had been engaged as an attorney for approximately fourteen years at the time of appellant's trial;

2) Mr. Mouledoux conferred with appellant at the Parish Prison at least twice and perhaps four times prior to trial regarding trial strategy;

3) Mr. Mouledoux read the transcript of appellant's preliminary hearing. (Mr. Mouledoux did not represent appellant at the preliminary hearing.);

4) Mr. Mouledoux was aware of the penalty for the crime charged;

5) Mr. Mouledoux thoroughly examined the District Attorney's file prior to trial;

6) Mr. Mouledoux again discussed the case thoroughly with appellant the morning of trial;

7) Mr. Mouledoux skillfully and vigorously cross-examined the State's witnesses;

8) Mr. Mouledoux discussed with appellant whether appellant should testify in his own behalf. Appellant, after such consultation, decided that he should not testify;

9) Mr. Mouledoux made numerous and appropriate objections during the course of the trial;

10) Mr. Mouledoux had an investigator aiding him in the defense of appellant;

11) Mr. Mouledoux filed a Motion For New Trial on behalf of the appellant; and

12) Mr. Mouledoux filed a Motion For Appeal on behalf of appellant.

The standard for judging the effectiveness of retained counsel is set forth in Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975)(en banc):

> "In sum, whenever the actions of retained counsel operate to deprive the trial of fundamental fairness then the Fourteenth Amendment due process has been violated notwithstanding any kind of specific involvement by a particular state official. If

> a retained counsel's actions do not sap the proceedings' fundamental fairness, but are challenged as less than reasonably effective in violation of the Sixth Amendment, state involvement through actual or constructive awareness of the error by the judge, prosecutor, or other responsible official who could have corrected it, must be shown."

Thus, to establish a denial of the Sixth Amendment right to counsel where defendant retained his own counsel requires a showing of either (1) that retained counsel's performance was "so grossly deficient as to render the proceedings fundamentally unfair" or (2) that retained counsel's incompetence is so apparent that a reasonably attentive official of the state should have been aware of it and could have corrected it. Fitzgerald v. Estelle, supra; Howard v. Henderson, 519 F.2d 1176 (5th Cir. 1975); United States v. Childs, 571 F.2d 315 (5th Cir. 1978).

However, the right to effective assistance of counsel under the Sixth and Fourteenth Amendments does not mean "errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Howard v. Henderson, supra; Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974), citing McKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), cert. denied 268 U.S. 877, 82 S.Ct. 121 (1961).

Mr. Mouledoux testified that prior to trial he met with appellant at the Parish Prison at least twice and perhaps four times in order to discuss the case. (See Exhibit B of Record on Appeal, 79-1646, hereinafter referred to as "Tr." p. 27). He further testified that he had studied the transcript of the

preliminary hearing. Tr. 28. He was aware of the penalty the appellant faced for the crime charged. Tr. 28. Moreover, counsel testified that he was fully familiar with the District Attorney's file. Tr. 46. This fact was corroborated by the prosecuting District Attorney Nick Noriea. Tr. 46. Moreover, the United States Magistrate in its Report and Recommendation, adopted by the United States District Court found that: (Tr. 44)

> "The record reflects (and the testimony of the prosecuting attorney and other witnesses at petitioner's state court hearing substantiate, Tr. 61-63), that counsel engaged in skillful and vigorous cross-examination of the State's witnesses and made numerous and appropriate objections during the course of the trial. Additionally counsel testified that it was petitioner and not counsel who decided that petitioner would not testify in his own behalf at the trial of this matter."

The United States District Court concluded that:

> "There is nothing in the record to suggest that defendant had a trial so fundamentally unfair as to violate his rights to due process under the Fourteenth Amendment."

Appellant in his petition to the trial court alleged two specific reasons why retained counsel was ineffective. First, appellant alleged that retained trial counsel was intoxicated. This allegation has been totally abandoned. Second, appellant alleged that trial counsel's failure to file a motion to suppress the evidence denied appellant "a substantial defense".

At the hearing on petitioner's writ of habeas corpus, counsel testified that the District Attorney's Office had opened its file to him and after a review of that file and based upon discussions with his client, he did not think any pretrial motions were warranted. Tr. 29, 46. He also testified that based upon certain portions of the transcript of the preliminary hearing alone, he did not think the police had probable cause to follow Lewis into the bar, but did have a right to go into the bar and search the coat because it had been abandoned. Tr. 37-39. See State v.Ryan, 358 So.2d 1274 (La.1978). Although counsel prepared a motion to suppress, he decided not to file it after consulting with Lewis who told him he didn't go near the coat or put anything in it and that it was the police who walked over to the coat and put something into his pocket. This was a completely different story from that which came out at the preliminary hearing and in counsel's opinion, based upon a review of the District Attorney's file, a review of the preliminary hearing, and discussions with his client, it would have been a breach of his professional responsibilities to file a motion so frivolous and misleading. Tr. 39-43.

Mere errors of judgment or a mistaken choice of strategy by an attorney is insufficient to support a finding of lack of effective assistance of counsel in a constitutional sense. Coco v. United States, 569 F.2d 367 (5th Cir. 1978); United States v. Meyer, 417 F.2d 1020 (8th Cir. 1969); Loftis v. Estelle, 515 F.2d 872 (5th Cir. 1975). The Fifth Circuit correctly held in the present case that if counsel erred in failing to file the motion, that that error would not compel a finding of fundamental unfairness.

However, assuming arguendo that petitioner's counsel was less than reasonably effective, both the United States District Court and the Fifth Circuit ruled that "the record fails to demonstrate that petitioner's counsel was so blatantly ineffective that the Louisiana trial court or any one of its responsible officials knew or should have known that Lewis was receiving inadequate representation." Loftis v. Estelle, supra; United States v. Graza, 563 F.2d 1164 (5th Cir. 1977); Alverez v. Wainwright, 522 F.2d 100 (5th Cir. 1975).

Finally, in a post-application memorandum to this Honorable Court, counsel for petitioner cites the unpublished decision of United States v. Brown, 27 Cr.L. 2081 (D.C. Cir. 1980), as allegedly being instructive to this Court and relevant to its decision in this case. The Brown case, however, arises from a motion for new trial and deals with an interpretation of the "cause" exception of F.R.Crim.Proc. 12, which provides that ordinarily a failure to make a suppression motion before trial constitutes waiver. The court held that ineffective assistance of counsel in that regard could, under some circumstances, fulfill the "cause" prerequisite so that a defendant could raise a suppression motion directly by way of a motion for a new trial. Brown thus has limited relevance to the instant case. First, unlike the instant case, it involves direct attack of a federal conviction, and not collateral federal habeas attack upon a state conviction. As such, the issues involved and standards to be applied are totally different.

Second, as that court stated, "Rather than address the separate question of ineffective assistance of counsel, we consider whether Brown may raise his suppression claim directly."

Brown, supra, at 2082. Brown, then, is not an effective assistance case at all, but a "cause and prejudice" case under F.R. Crim.Proc. 12. Third, unlike the present case, the facts in Brown did not show a clear case of abandonment, and the decision was based largely on those grounds. For these reasons, the Brown case is inapplicable with regard to the decision which must be made by this Honorable Court in the instant case.

CONCLUSION

In light of the foregoing, it is respectfully submitted that the decisions of the District Court and the Fifth Circuit Court of Appeals were correct under the facts of this case and the applicable jurisprudence, and that this Honorable Court should therefore deny the petition.

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